

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

CR 05-2366 JEC

JULIO GUERRERO-CASTRO,

Defendant-Movant.

**ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION**

THIS MATTER is before the Court on Magistrate Judge Lourdes A. Martínez' *Proposed Findings and Recommended Disposition* (Doc. 41) (hereinafter "PF&RD"), filed on August 22, 2011. On September 29, 2011, Mr. Guerrero-Castro filed objections to the PF&RD [Doc. 45], which the Court considers timely because Mr. Guerrero-Castro was given additional time to file his objections. *See* [Doc. 44]. The United States did not file any objections to the PF&RD nor did it respond to Mr. Guerrero-Castro's objections, and the deadlines for doing so have passed. The Court has conducted a *de novo* review of those portions of the PF&RD to which Mr. Guerrero-Castro objects and finds that his objections are without merit. Accordingly, the Court will: (1) overrule Mr. Guerrero-Castro's objections as meritless; (2) adopt the PF&RD; and (3) deny Mr. Guerrero-Castro's *Petition for Writ of Error Coram Nobis* (Doc. 33).

In the PF&RD, the Magistrate Judge found that Mr. Guerrero-Castro's counsel was not ineffective for failing to advise him of the immigration consequences of his guilty plea pursuant to *Padilla v. Commonwealth of Kentucky*, 130 S. Ct. 1473, 1483 (2010), because Mr. Guerrero-Castro failed to establish prejudice from this alleged failure. [Doc. 41 at 10]. Specifically, the Magistrate

Judge found that Mr. Guerrero-Castro failed to establish that he would have gone to trial if he had known about the deportation consequences of his plea, and failed to make a showing that a different plea agreement would have been offered to him if he had refused the one that he had signed. *Id.* at 10-14. In his objections, Mr. Guerrero-Castro states that he objects to these findings, but fails to provide any support that would establish prejudice. Mr. Guerrero-Castro states that, if his counsel had presented to the United States the facts that he served as a United States Marine, he did not have a significant criminal history, he was a long-time resident of the United States, and his family lived here, that the United States may have agreed to a different plea. [*Doc. 41* at 14]. This does not provide evidence that such a plea would have been available to Mr. Guerrero-Castro, and the Court agrees with the Magistrate Judge that this claim is, therefore, conclusory and should be denied. *Id.* at 14 (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110). The Court, therefore, finds that Mr. Guerrero-Castro's objections are without merit.

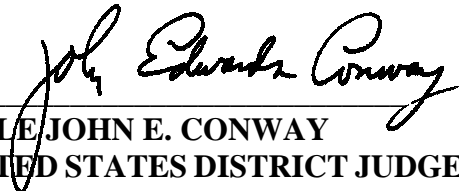
Moreover, the Court notes that after the Magistrate Judge issued her PF&RD, the Tenth Circuit issued a decision holding that *Padilla* does not apply retroactively. In *United States v. Hong*, --- F.3d ----, 2011 WL 3805763 (10th Cir. Sept. 1, 2011), the Tenth Circuit found that "*Padilla* is a new rule of constitutional law, but it does not apply retroactively to cases on collateral review." *Id.* at *1. The Tenth Circuit's reasoning is based on its finding that *Padilla* applied the holding of *Strickland v. Washington*, 466 U.S. 668 (1984) to immigration consequences of a guilty plea, which "was an extension of *Strickland* into previously untread grounds." *Id.* at *7 (citation omitted). Because the Tenth Circuit has now held that *Padilla* is not retroactive, Mr. Guerrero-Castro's petition, which asks the Court to apply the holding of *Padilla* retroactively, should be denied.

IT IS THEREFORE ORDERED that Mr. Guerrero-Castro's *Objections to Proposed Findings of Fact and Recommended Disposition of Magistrate Judge (Doc. 45)* are **OVERRULED**.

IT IS FURTHER ORDERED that the *Proposed Findings and Recommended Disposition (Doc. 41)* are **ADOPTED** by the Court.

IT IS FURTHER ORDERED that Mr. Guerrero-Castro's *Petition for Writ of Error Coram Nobis (Doc. 33)* is **DENIED**.

IT IS SO ORDERED.



HONORABLE JOHN E. CONWAY
SENIOR UNITED STATES DISTRICT JUDGE